Supreme Court, U.S.
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No. 01-536

In The

Supreme Court of the United States

DAVID R. TINKLE,

Petitioner,

vs.

OKLAHOMA GAS AND ELECTRIC COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower courts were correct in their determination that Petitioner had made no *prima facie* showing of retaliation for his participation in a co-worker's age discrimination lawsuit in the absence of evidence that Petitioner's supervisor, the alleged retaliatory actor, was aware of Petitioner's participation in the co-worker's age discrimination suit.

CORPORATE DISCLOSURE STATEMENT

Oklahoma Gas and Electric Company states that it is a wholly-owned subsidiary of OGE Energy Corporation, a public company.

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STATEMENT OF THE CASE

Petitioner, David Tinkle, contends that he was the target of retaliation after he gave testimony by deposition in the case styled *Don Riffel v. Oklahoma Gas and Electric Company*, United States District Court for the Western District of Oklahoma, Case No. CIV-96-1179-A. Petitioner had neck surgery in March 1997 and was medically released to return to work in the Heavy Hauling Department at Oklahoma Gas and Electric Company ("OG&E") on June 2, 1997. On June 6, 1997, Petitioner gave his deposition in the *Riffel* case. On August 21, 1997, after returning to work with no medical restrictions, Petitioner re-injured his neck while driving a crane and was off work, first on sick leave, then short-term disability leave and finally on long-term disability.

Petitioner was not fired from his position by his supervisor, John Singleton. After he re-injured his neck in August 1997, Petitioner was never medically released to return to his job in the Heavy Hauling Department. Petitioner applied for and received long-term disability benefits from American Fidelity, the separate company administering long-term disability benefits. After several months, American Fidelity decided to terminate Petitioner's long-term disability benefits because he did not meet the criteria for continued benefits under the terms of the written ERISA plan. Petitioner was removed from the OG&E payroll after his long-term disability benefits were terminated by American Fidelity in 1999 and he had provided no medical clearance to return to work. Petitioner subsequently applied for reinstatement to his former position in the Heavy Hauling Department in May,

1999. This request was denied, however, because Petitioner did not produce a medical release (requested by OG&E) showing he was medically able to return to his former duties. Petitioner did not apply for other jobs at OG&E and is currently not employed by OG&E.

Petitioner filed suit on August 4, 1999, in the United States District Court for the Western District of Oklahoma ("District Court") alleging interference with his right to receive benefits in violation of the Employee Retirement Income Security Act ("ERISA"), *29 U.S.C. § 1140*; intentional or negligent infliction of mental and/or emotional distress; violation of the Age Discrimination in Employment Act ("ADEA"), *29 U.S.C. §§ 621, et seq.* and retaliation for participation in an enforcement action under the ADEA. The District Court granted OG&E's Motion for Summary Judgment on each of Petitioner's claims. Petitioner lodged an appeal from the final Order of the District Court, alleging that the District Court abused its discretion in granting OG&E's Motion for Summary Judgment on the retaliation claim under the ADEA. The Tenth Circuit Court of Appeals determined that the only claim preserved for appeal was that for retaliation and affirmed the District Court's ruling on the ADEA retaliation claim. (*Pet. App. A at 2a.*)

REASON FOR DENYING THE WRIT

To establish a *prima facie* case of retaliation under the ADEA, a plaintiff must show: (1) that he or she was engaged in protected opposition to age discrimination; (2) that he or she was subjected to an adverse employment action; and (3) that a causal connection existed

between the protected activity and the adverse employment action. *See Sanchez v. Denver Public Schools*, 164 F.3d 527, 533 (10th Cir. 1998). For the first time in this litigation, Petitioner argues that the second element of a retaliation claim – the occurrence of an adverse employment action – should be determined according to the hostile work environment standards articulated in *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2268 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998); and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993). (*Petition at 8.*) None of these decisions were cited in Petitioner's Response to Defendant's Motion for Summary Judgment and Brief in Support or in Petitioner's Brief to the Tenth Circuit Court of Appeals. Obviously, the courts below should not be charged with error for "failure" to apply standards not articulated, or even suggested, to those courts in any of Petitioner's pleadings. *See Weiss v. Duro Chrome Corp.*, 207 F.2d 298, 300 (8th Cir. 1953). ("The trial court having had no opportunity of passing upon the question now for the first time presented cannot be charged with error for failing to do that which it was not requested to do.") *See also Fireman's Fund Ins. Co. v. S.E.K. Const. Co.*, 436 F.2d 1345, 1352 (10th Cir. 1971); *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708, 711 (10th Cir. 1970); and *U.S. v. Gates*, 376 F.2d 65, 75 (10th Cir. 1967).

The complained-of conduct here, even if "taken as a whole" as urged by Petitioner, does not rise to the level of actionable harassment under the standards articulated in *Harris, Faragher, Ellerth* and *Oncale*. (*Proposition 3, infra.*) Even if it did, Petitioner still cannot establish an essential element of a *prima facie* case of retaliation. Both the District

Court and the Court of Appeals found that Petitioner had made no showing of the third element of his retaliation claim – a causal connection between an adverse employment action and his protected activities under the ADEA. In the absence of any evidence that Petitioner's supervisor, John Singleton, the alleged retaliatory actor, was even aware that Petitioner had participated in Riffel's ADEA action, Petitioner did not, and cannot, make a *prima facie* showing of retaliation. (*Proposition 2, infra.*)

Application of the hostile work environment standards of *Harris, Faragher, Ellerth* and *Oncale* cannot affect the ultimate outcome of this case. Petitioner has no evidence of the third element of an ADEA retaliation claim – a causal connection between his participation in the *Riffel* suit and the complained-of actions allegedly taken by his supervisor. Therefore any determination by the Court on that issue would be, in effect, an impermissible advisory opinion. *See, e.g., U.S. v. Fruehauf,* 365 U.S. 146, 157, 815 S.Ct. 547, 553-54 (1961) and *Secretary of Agriculture v. Central Roig Refining Co.,* 338 U.S. 604, 619-20, 70 S.Ct. 403, 411 (1950). Petitioner's Petition for a Writ of Certiorari should be denied.

STATEMENT OF FACTS

Petitioner once again attempts to secure review in this case based on "facts" not in evidence. A review of the proceedings below shows that Petitioner has no evidence that he "begged" his supervisor to not force him to drive a crane because of neck problems (*Petition at 10*), no evidence that his supervisor, John Singleton, advised him

not to file a workers' compensation claim (*Petition at 6-7*) and no evidence that he "enjoyed a complaint free employment environment prior to his participation in the *Riffel* case." (*Petition at 12.*)

Attached to Petitioner's Response to OG&E's Motion for Summary Judgment was an affidavit containing several statements contrary to Petitioner's earlier sworn deposition testimony. The District Court ruled that because Petitioner did not explain the contradiction between the statements in his affidavit and those in his deposition testimony, Petitioner had not created a material issue of fact with his contradictory affidavit. (*Pet. App. B at 17a.*) In his opening brief to the Tenth Circuit Court of Appeals, Petitioner again attempted to put forth evidence by means of statements in this responsive affidavit that contradicted his earlier sworn testimony. And again, Petitioner offered no explanation for the contradictions. The Tenth Circuit held that the magistrate judge had "properly disregarded statements in plaintiff's affidavit that contradicted his earlier sworn deposition testimony." (*Pet. App. A at 4a.*)

Petitioner alleges that he "begged" of his supervisor that he not be made to drive the "75-Ton Road Crane" because of his neck, but that his request was denied. (*Petition at 10.*) According to his deposition testimony, the conversation about the assignment to drive the crane went quite differently. Petitioner testified in his deposition that he told his supervisor, John Singleton, that he did not need to be in the crane because he "knew how to run it" and that Singleton's response was that Petitioner needed the experience and was being paid to drive all of the equipment in his department and needed to do all the

work that was required. (*Pet. App. B at 17a; Res. App. at 14-15, 21.*) According to his own testimony, Petitioner never said to his supervisor anything along the lines of "I'm afraid I'm going to get hurt if I drive the crane." (*Pet. App. B at 17a; Res. App. at 15, 21.*)

Petitioner also alleges that his supervisor, John Singleton, advised him not to file a workers' compensation claim. (*Petition at 6-7.*) Again, Petitioner contradicts his own deposition testimony. At his sworn deposition, Petitioner testified that he was never told by anyone that he could not file for workers' compensation and conceded that it was he who made the decision not to file a workers' compensation claim, but to file an insurance claim instead. (*Pet. App. B at 20a, 25a; Res. App. at 3-4, 19-20.*) He further testified that he did not talk with his doctor or ask anyone about filing a workers' compensation claim. (*Res. App. at 3-4, 19-20.*)

Nowhere in the record or in his Petition does Petitioner explain the blatant contradictions between his sworn deposition testimony and the facts alleged in his affidavit. As discussed in Proposition 1, *infra*, the District Court and the Court of Appeals were correct to conclude that Petitioner's affidavit was an attempt to create a sham fact issue and to disregard the purported "evidence" put forth therein. This Court should also disregard the "evidence" brought into the record via the contradictory statements in Petitioner's affidavit.

Petitioner makes the conclusory allegation that he was "illegally placed on short-term/long-term disability," but offers no evidence in support of his contention. (*Petition at 6 n. 3.*) Nor does Petitioner have evidence to

support his allegations that Singleton "conditioned Tinkle's return on being able to drive the 75-Ton Road Crane" or that "Singleton intentionally kept Tinkle away for a period sufficient for 'short term' disability to 'kick in.' " (Petition at 6 n. 3.) The District Court found no "material issue of fact as to whether OG&E interfered with Plaintiff's disability benefits . . . . " (*Pet. App. B at 26a-27a.*)

Petitioner did not present the issue of the alleged "illegality" of being placed on short-term disability to the Court of Appeals. (*Pet. App. A at 2a.*) Petitioner has thus "waived and abandoned" this issue for the purposes of appeal. *See Bodry v. United Airlines, Inc.*, 58 F.3d 1483, 1490 (10th Cir. 1995). Nor did Petitioner appeal to the Tenth Circuit his ERISA claim concerning the alleged interference with his disability benefits. (*Pet. App. A at 2a.*) Accordingly, this Court should disregard Petitioner's allegation that the District Court improperly considered "evidence that a jury would not be required to see or believe, such as investigatory or inquiry type letters from plaintiff's counsel to the insurance carrier regarding long term disability benefit [sic] of plaintiff." (*Petition at 11.*)

Disregarding those "facts" that contradict Petitioner's sworn deposition testimony and those allegations for which there is no factual support, the facts in evidence relevant to the correctness of the rulings below on Petitioner's retaliation claim under the Age Discrimination in Employment Act, are as follows:

(1) Driving a 75-ton road crane was a normal part of the job duties of Petitioner and other members of the

Heavy Hauling Department at OG&E. (*Pet. App. B at 30a; Res. App. at 13-14, 21*);

(2) In 1997, when he was assigned to drive the crane, Petitioner had been released back to work by his doctor with no medical restrictions. (*Pet. App. B at 17a; Res. App. at 14, 21-22, 33*);

(3) When Petitioner was assigned by his supervisor to drive the crane, he did not inform his supervisor that he was concerned about possible re-injury of his neck. (*Pet. App. B at 17a, 30a; Res. App. at 14-15, 21*);

(4) Petitioner started keeping notes at work in 1985 because he felt like he was being harassed. Petitioner felt as early as 1985 that John Singleton (who was not then his supervisor) was out to get him. Petitioner took notes because he was questioned about work-related issues and he wanted to be able to prove that he was doing his job. According to Petitioner, John Singleton harassed him and "anyone he wants to." (*Pet. App. B at 8a-9a,*[1] *16a-17a*);

(5) After Petitioner re-injured his neck on August 21, 1997, he was never released by his doctor to return to full duty of his position in the Heavy Hauling Department at OG&E. (*Pet. App. B at 9a; Res. App. at 4-6, 27-30*);

(6) When Petitioner attempted to return to his former position at OG&E in May 1999, he had not been released to full-duty by his doctor. (*Pet. App. B at 10a; Res. App. at 4-6, 25*);

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[1] Petitioner's Appendix B, p. 8a, ¶5 contains a typographical error. The original Order reflects Petitioner's deposition testimony that he began keeping notes in 1985 rather than 1995. *See Pet. App. B at 16a.*

(7) The most recent medical information Petitioner submitted to OG&E was dated April 5, 1999, and signed by Dr. Schimandle. Petitioner remained under the following restrictions: no lifting or carrying of more than 25 pounds; no repetitive use of the hands, wrists, or fingers; and no operating of heavy equipment. (*Pet. App. B at 10a; Res. App. at 4-5, 27-30*);

(8) Because of Petitioner's medical restrictions, he could not return to his previous job in the Heavy Hauling Department at OG&E. Petitioner never applied for any other positions at OG&E. (*Pet. App. B at 10a; Res. App. at 35-36.*)

ARGUMENT

PROPOSITION 1

THE LOWER COURTS CORRECTLY DISREGARDED STATEMENTS IN PETITIONER'S AFFIDAVIT CONTRARY TO SWORN DEPOSITION TESTIMONY.

Attached to his Response to OG&E's Motion for Summary Judgment to the District Court was an affidavit by Petitioner containing several statements contrary to his sworn deposition testimony. Citing *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986),[2] the District Court ruled

[2] In *Franks v. Nimmo*, the court held that an affidavit conflicting with the affiant's prior sworn statements may be disregarded if the court concludes that the affidavit is merely an attempt to create a sham fact issue. Factors relevant to this determination include whether the affiant had access to pertinent evidence at the time of the prior testimony and

that because Petitioner did not explain the contradiction between the statements in his affidavit and those in his deposition testimony, he had not created a material issue of fact with his contradictory affidavit. (*Pet. App. B at 17a, 36a.*) In his opening brief to the Tenth Circuit Court of Appeals Petitioner again attempted to put forth evidence by means of statements in his responsive affidavit that contradicted his earlier sworn testimony, again, without any explanation of the blatant contradictions between his sworn testimony and the statements in his affidavit. Citing *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1224 (10th Cir. 2000),[3] the Tenth Circuit determined that the "magistrate judge properly disregarded statements in Plaintiff's affidavit that contradicted his earlier sworn deposition testimony." (*Pet. App. A at 4a.*)

This Court, in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806-807, 119 S.Ct. 1597, 1603-04 (1999) agreed with the approach taken in *Franks v. Nimmo* and similar cases from other circuits where courts "have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without

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whether the earlier testimony reflects confusion that the affidavit attempts to explain. *Franks*, 796 F.2d at 1237.

[3] In *Kendrick*, the Tenth Circuit cited its earlier decision in *Franks v. Nimmo* to disregard an affidavit that was not based on evidence unavailable to the affiant at the time of the earlier sworn deposition and where the affidavit did not appear to be an attempt to clarify confusing testimony given at the deposition.

explaining the contradiction or attempting to resolve the disparity." This is just such a case. Nowhere in the record or in the current Petition is there any indication that Petitioner's affidavit was an attempt to clarify confusing testimony or any evidence that the affidavit reflected information not available to Petitioner at the time his deposition testimony was given. Therefore, this Court should also disregard the "evidence" brought into the record through Petitioner's contradictory affidavit. Specifically, the Court should disregard: (1) evidence that Petitioner "begged" his supervisor not to drive the road crane because he feared he would injure his neck (*Petition at 10*); and (2) Petitioner's contention that his supervisor advised him not to file a workers' compensation claim. (*Petition at 6-7*).

PROPOSITION 2

PETITIONER HAS NOT MADE A *PRIMA FACIE* CASE OF RETALIATION IN THE ABSENCE OF EVIDENCE THAT HIS SUPERVISOR WAS AWARE OF PETITIONER'S PROTECTED ACTIVITY.

To make a *prima facie* case of retaliation for participation in protected activity under the ADEA, a plaintiff must show: "(1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer contemporaneously or subsequent to the employee's protected activity; and (3) a causal connection between such activity and the employer's action." *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 634 (10th Cir. 1988) (*citing Burrus v. United Tel. Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491 (1982)). Petitioner has

failed to establish the requisite causal connection between any allegedly "adverse" employment actions and his participation in the *Riffel* lawsuit. Petitioner put forth no evidence whatsoever indicating that his supervisor, John Singleton, was aware of the alleged telephone conversation between Petitioner and the attorney representing OG&E in Don Riffel's ADEA action or was aware that Petitioner gave deposition testimony that he believes was adverse to OG&E. (*Pet. App. A at 4a; Pet. App. B at 35a-37a.*)

Absent any evidence that Singleton was aware of Petitioner's deposition, its content, or of Petitioner's telephone conversation with OG&E's counsel, there is no evidence from which a jury could reasonably infer a causal connection between Petitioner's protected activities and any of the "adverse actions" alleged by Petitioner. *See Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 635 (10th Cir. 1988) (*citing Guenther v. County of Washington*, 623 F.2d 1303, 1316 (9th Cir. 1979), *aff'd*, 452 U.S. 161, 101 S.Ct. 2242 (1981) (no evidence to infer individual responsible for adverse decision actually knew of employees' protected activity; therefore, Petitioners did not prove necessary link between their activity and Defendant's adverse action that would establish *prima facie* case)). *See also Williams v. Rice*, 983 F.2d 177, 181 (10th Cir. 1993) (removed employee failed to establish *prima facie* case of retaliation where employee failed to provide any evidence that supervisor who made decision to remove employee was aware of complaints made by the employee to the EEOC); *McCollum v. Bolger*, 794 F.2d 602, 610-611 (11th Cir. 1986), *cert. denied, McCollum v. Tisch*, 479 U.S. 1034, 107 S.Ct. 883 (1987) (rescheduling of

employee's work could not have been retaliation for participation in Title VII proceeding where supervisor making the rescheduling decision did not know of employee's participation); *Talley v. United States Postal Service*, 720 F.2d 505, 508 (8th Cir. 1983), *cert. denied*, 466 U.S. 952, 104 S.Ct. 2155 (1984) (discharge of USPS employee was not retaliatory where supervisor who discharged employee was not aware of employee's complaints concerning racial discrimination).

Petitioner must have some evidence beyond an allegedly "adverse" action subsequent to his protected activity in order to show the required knowledge. In *Anderson*, the court found that the plaintiff had established the causal link needed for a *prima facie* case of retaliation where the claimed retaliatory conduct was failure to hire the plaintiff at another company-owned facility during the pending shut down of the facility where he worked. There, the plaintiff had evidence that a supervisor in the company's central personnel clearinghouse sometimes communicated adverse job-related information by telephone to potential hiring locations within the company. *See Anderson, supra*, 861 F.2d at 635. The Court held that this was evidence from which the jury could infer that individual decision makers were aware that Anderson had filed an age discrimination claim. *Id.*

By contrast, in *Guenther*, jail matrons alleged that certain "adverse" actions were taken by the Sheriff after they made equal pay claims. The Ninth Circuit found no *prima facie* case where the matrons could not show that the Sheriff was aware of their equal pay claims:

> Only if there is evidence that the Sheriff actually knew that the plaintiffs raised such claims, rather than other matrons, can we infer that the Sheriff gave negative recommendations to the plaintiffs and positive recommendations to the other matrons for vindictive reasons. The plaintiffs presented no such evidence.

Guenther, supra, 623 F.2d at 1316.

Here, the District Court found that Petitioner did not "present any facts from which it can be inferred that Singleton was even aware of Plaintiff's deposition testimony." (*Pet. App. B at 35a.*) The Tenth Circuit upheld this finding:

> Plaintiff also failed to present evidence that a causal connection existed between his participation in the Riffel case and the alleged adverse employment actions. He presented no evidence that Singleton had any knowledge that Plaintiff was a witness in the Riffel case, had refused to cooperate with an OG&E attorney or had given deposition testimony implicating Singleton.

(*Pet. App. A at 4a.*)

Petitioner argues that the District Court's finding that there was no evidence that Singleton was aware of Petitioner's deposition testimony "presupposes that a reasonable factfinder could not infer that: (1) Tinkle's assignment to drive the 75-Ton Road Crane; (2) Tinkles [sic] resultant injury; (3) Singleton's failure to allow Tinkle to file a workers' compensation claim; and (4) Tinkle's ultimate termination was caused by Tinkle's testimony against Singleton." (*Petition at 23.*) Even assuming that these actions could be retaliatory, which Defendant

asserts they are not, Petitioner is asking this Court to infer from that assumption that Petitioner's supervisor must have known about Petitioner's protected activities.

As *Guenther* and the other cases cited above make clear, a plaintiff cannot rely upon the courts to infer an element of a *prima facie* case on which the plaintiff has not met his or her burden of producing evidence. (*Pet. App. A at 4a.*) Petitioner failed to meet the burden of presenting the District Court with either direct evidence that his supervisor was aware of his protected activities (e.g., Singleton making comments about the *Riffel* case) or facts from which that knowledge could be inferred (e.g., Singleton's attendance at a meeting or receipt of a report where the *Riffel* case was discussed). It is simply not enough to ask the Court to assume that Singleton was aware of the protected activities based on the allegedly retaliatory actions taken by Singleton. *See Guenther,* 623 F.2d at 1316. Because Petitioner cannot show a *prima facie* case of retaliation in violation of the ADEA, the Petition for Writ of Certiorari should be denied.

PROPOSITION 3

PETITIONER HAS NOT SHOWN THAT HE WAS SUBJECTED TO "SEVERE OR PERVASIVE" RETALIATORY HARASSMENT.

For the first time in this litigation, Petitioner argues that the second element of a retaliation claim – the occurrence of an adverse employment action – should be determined according to the standards articulated in *Reeves v.*

Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000); *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2268 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998); and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993). (*Petition at 8.*) *Ellerth, Faragher, Harris* and *Oncale* each address sexual harassment claims, while *Reeves* addresses evidentiary burdens in the context of an age discrimination claim. None specifically address retaliation claims, either under Title VII or the ADEA. Petitioner appears to be arguing that harassment that creates a "hostile" or "abusive" work environment can be actionable as unlawful retaliation under the ADEA. However, Petitioner cites no authority for the proposition that the analysis of the "hostile work environment" found in these cases is applicable to an ADEA retaliation claim.

Assuming, for the sake of argument only, that these standards are applicable to such a claim, Petitioner has failed to put forth any evidence that he was subjected to harassment so "severe or pervasive" that it amounted to an actionable adverse employment action. In *Harris v. Forklift Systems, Inc.*, this Court held that to be actionable under Title VII as an "abusive work environment," the racial or sexual harassment must be shown to create an objectively hostile or abusive environment. In addition, there must be a showing that the plaintiff actually did perceive the environment as abusive or hostile. 510 U.S. 17, 24, 114 S.Ct. 367, 371 (1993). Stating that discriminatory conduct "so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's

broad rule of work place equality," the Court noted that the two-pronged test it enunciated "cannot be a mathematically precise test." *Id.* This Court did, however, in the context of racial and gender harassment, provide the following guidance:

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all of the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id.

Petitioner argues that OG&E "intentionally subjected him to physical harm" via the order to drive the road crane. (*Petition at 2.*) Petitioner also implies that the order to drive the road crane was negligent:

> Despite the fact that Tinkle suffered injury as a result of a work assignment, given to him by his supervisor, and it was foreseeable that the assignment would cause the injury that did in fact result, both Courts held that those allegations did not state a 'adverse employment action' under the first prong of *Sanchez*.

(*Petition at 16.*) Concerning any claim for the injury itself, the District Court correctly found that Petitioner's "sole

remedy" for "negligent injury under the facts alleged" is the Oklahoma Workers' Compensation Act at Title 85 of the Oklahoma statutes. (*Pet. App. B at 29a.*) Petitioner offers no argument or evidence to refute the District Court's holding in this regard.

If, on the other hand, Petitioner is relying on the theory that his injury in the crane was the intended result when Singleton ordered Petitioner to drive the crane, Petitioner's only viable claim would be against John Singleton individually, rather than against OG&E. The general rule is that an agent's tortious or criminal assault upon another cannot be considered within the scope of the agent's authority, unless the assault could have been "anticipated by the employer" as a foreseeable means of accomplishing the job for which the agent was employed. *Clark v. Brien*, 59 F.3d 1082, 1087 (10th Cir. 1995) (*citing, inter alia, Allison v. Gilmore, Gardner & Kirk, Inc.*, 350 P.2d 287, 290-92 (Okla. 1960)).

In *Allison*, the court held the employer was not liable when an employee had an altercation with a third party who challenged the way the employee was doing his job. *See also Tulsa General Drivers Union v. Conley*, 288 P.2d 750, 753 (Okla. 1985) ("It is not, as a general rule, within the scope of the servant's employment to commit an assault upon a third person and the master is not liable for such an assault, though committed while the servant was about his master's business."). There is no evidence that Petitioner's injury in the crane was the result of negligent or intentionally harmful conduct on Singleton's part. Nor has Petitioner put forth evidence that any intentional assault against him by Singleton could have been "anticipated" by OG&E.

The complained-of assignment to drive a crane from Ardmore, Oklahoma, to Oklahoma City (approximately 80 miles) came on August 21, 1997, after Petitioner had been medically released to full duty subsequent to his neck surgery in March, 1997. (*Pet. App. B at 17a; Res. App. at 13-14, 20-22, 33.*)[4] As discussed in Proposition 1, *supra*, there is simply no evidence in the record that Petitioner "begged Singleton to not force him to drive 80 miles in the 75-Ton Road Crane." (*Petition at 10; Pet. App. B at 17a, 29a-31a.*) According to Petitioner's sworn deposition testimony, when assigned to drive the crane Petitioner made only a vague statement to his supervisor about already knowing how to run it. The supervisor responded that Petitioner was expected to perform all of the tasks for which he was being paid:

> I told John [Singleton] that I did not think I should be in it [the crane], that I knew how to run it. And he said, "you need the experience and you're going to drive it." And I said, "I

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[4] Petitioner alleges that the "District Court erroneously misstates the time and substance of Plaintiff's claim by stating: 'these allegations involve actions taken more than two years after the alleged statements by Singleton . . . . ' " (*Petition at 12 n.7.*) That statement by the District Court was made in the context of its discussion of whether comments allegedly made by John Singleton about Petitioner's co-worker, Don Riffel, constituted direct evidence of *age discrimination* by John Singleton against Petitioner. In that context, the Court correctly pointed out that the comments had allegedly occurred in March, 1995, and none of the allegedly discriminatory actions of which Petitioner was complaining in his own suit occurred until 1997. (*Pet. App. B at 13a and 14a.*) In any event, Petitioner has waived his age discrimination claim under the ADEA for purposes of appeal. (*Pet. App. A at 2a.*)

> know how to drive it." He said, "you're being paid top pay to do everything. You will drive it back from Ardmore."

(*Pet. App. B at 30a; Res. App. at 21.*)

Petitioner alleges that one of the "two other persons who were assigned to drive the 75-Ton Road Crane were present" at the time he was assigned to drive the Crane and "one stated that he would drive instead of Tinkle." (*Petition at 19.*) Petitioner's deposition testimony indicates that this offer was made to Petitioner, that the offer was not communicated to Petitioner's supervisor, John Singleton, and that Petitioner declined the offer. (*Res. App. at 33.*) In addition, Petitioner's deposition testimony shows that on a previous occasion when he had been ordered to drive the same crane by Singleton, he had made no complaint of any physical discomfort:

> Q. Well, when you drove it from Oklahoma City to Shawnee [Oklahoma], when you got back to work that day, did you tell him, John, I had a hard time, I couldn't do it, don't ever give me that job again, or I was able to do it? Did you give him any information about that job?
>
> A. No.

(*Res. App. at 32.*) Given that Petitioner cannot show that Singleton was aware Petitioner was concerned about re-injury of his neck while driving the crane, the lower courts were correct in not considering "Tinkle's perception of fear of re-injury to his neck." (*Petition at 10.*) In the absence of awareness by Singleton of that fear, it is simply not logically relevant to whether the assignment to drive the crane was an "abusive" act.

The evidence below was that driving this crane was part of the normal duties of Petitioner and other members of the Heavy Hauling Department. (*Pet. App. B at 35a; Res. App. at 21.*)[5] On the day he was ordered to drive the crane, August 21, 1997, Petitioner had been medically released to full duty in the Heavy Hauling Department with no restrictions regarding operating or driving any specific pieces of equipment. (*Pet. App. B at 35a; Res. App. at 33.*) Petitioner introduced no evidence below that other members of his department had been injured while driving the crane. Petitioner refused to allow a co-worker to drive the crane on the day that he was injured. (*Res. App. at 32-33.*) Given these facts – that the Petitioner was medically released to work with no restrictions and that no one told Petitioner's supervisor that Petitioner was concerned about re-injury to his neck – the assignment to do a job required of members of Petitioner's department, cannot reasonably be characterized as "abusive."

Likewise, neither the denial of Petitioner's request to be assigned to a truck with "air-ride suspension" nor the denial of a long-term "light-duty" assignment constitute actionable acts of workplace abuse or harassment. The District Court correctly noted that "there is no evidence *all* employees in Plaintiff's work group received 'light-duty' assignments following injuries." (*Pet. App. B at*

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[5] Contrary to Petitioner's contention that "the lower courts did not consider the distinction between . . . 'operating' a crane versus 'driving' a crane eighty (80) miles . . . ," the District Court specifically addressed the evidence concerning the number of employees in the Heavy Hauling Department who had *driven* the crane. (*Petition at 14; Pet. App. B at 17a-18a, 35a.*)

33a-34a.) Petitioner's evidence concerning "light-duty" assignments merely indicates that some individuals were given various light-duty assignments for varying lengths of time. (*Pet. App. A at 4a; Pet. App. B at 34a.*) In fact, after a portion of the protected activity which Petitioner alleges resulted in retaliation – the conversation with OG&E's lawyer and the *Riffel* case in March, 1997 – Petitioner was given a two-day light-duty assignment. (*Res. App. at 20.*)

Because of the discretionary nature of light-duty assignments as reflected in Plaintiff's evidence, the District Court determined that "no retaliatory inference can be gleaned from Plaintiff's allegation concerning the 'denial of a light-duty assignment' given Plaintiff's own deposition testimony reflecting the absence of medical restrictions placed on Plaintiff and the discretionary nature and short length of 'light-duty' assignments given other co-workers." (*Pet. App. B at 34a.*) Just as no "retaliatory" inference can be gleaned from Petitioner's evidence, no jury could reasonably find that denial of "light duty" constituted "abuse" under the standards set forth in *Harris, supra,* 510 U.S. at 24.

The same analysis applies to the denial of assignment to a truck equipped with "air-ride suspension." Petitioner did not show that other Heavy Hauling Department workers were assigned to such trucks as an accommodation for back, neck or any other type of injury. (*Pet. App. B at 35a.*) There was no evidence that such assignments were routinely, or even occasionally, assigned based on physical limitations. Nor was there evidence that the assignment of trucks equipped with "air-ride suspension" was *ever* made in response to a request by an

employee. In the absence of such evidence, it is not possible to infer that the denial of this request was part of a pattern of retaliatory abuse.

Again, assuming for the sake of argument only, that the hostile work environment standards set forth in *Ellerth, Faragher, Oncale* and *Harris* are applicable to Petitioner's retaliation claim under the ADEA, Petitioner has failed to show that he was subjected to an abusive or hostile work environment subsequent to his participation in the *Riffel* lawsuit. Under the objective prong of the test articulated in *Harris*, the events about which Petitioner complains – assignment to drive a crane, denial of his request to be assigned at all times to a truck with air-ride suspension, and receipt of disability benefits rather than assignment to "light-duty" – even if taken as a whole, (as Petitioner argues should have been done under "an *Oncale* analysis,") do not add up to an "abusive" or "hostile" work environment. (*Petition at 16.*)[6]

Petitioner's complaint appears to be that he was abused because he was not given special treatment that he requested. As the District Court noted, "Plaintiff apparently believes special accommodations should have been made as a result of his neck and back injuries, but he fails to demonstrate that a disputed issue of fact exists with regard to the motivation of the supervisor in refusing to make these special accommodations." (*Pet. App. B at 18a.*) In the absence of evidence that similarly situated employees (*i.e.*, employees who were medically released

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[6] As discussed in Proposition 1, *supra*, Petitioner introduced no evidence below that he was denied his right to file a workers' compensation claim by OG&E.

to full duty but still concerned about some aspect of their health) were given the requested accommodations, Petitioner cannot show that he was treated *differently* than his co-workers, let alone forced to work in an "abusive" or "hostile" environment.

This Court has made clear that not all workplace conflicts are actionable under federal anti-discrimination statutes. *Oncale, supra,* 523 U.S. at 79-80 (citing *Harris,* 510 U.S. at 21, 1145 S.Ct. at 370). Petitioner argues that his work environment became hostile or abusive subsequent to his participation in the *Riffel* lawsuit; that his supervisor had an angry tone and gave him less time to complete paperwork. (*Petition at* 4.) Contrary to Petitioner's claim that he "enjoyed a complaint free employment environment prior to his participation in the *Riffel* case," the evidence indicates a long-term history of conflict between Petitioner and John Singleton. (*Petition at 12; Pet. App. B at 16a-17a.*) Petitioner testified that he started keeping notes at work in 1985 because he felt like John Singleton (who was not then his supervisor) was out to get him (*Pet. App. B at 16a-17a*). Petitioner testified that he took these notes because he was questioned about work-related issues and he wanted to be able to prove that he was doing his job. According to Petitioner's testimony, John Singleton harassed him and "anyone he wants to." (*Pet. App. B at 8a-9a and 16a-17a; Res. App. at* 2.) Against this backdrop of long-term conflict between Petitioner and John Singleton, it is simply not possible to reasonably infer that the denial of two requests for discretionary benefits and an assignment to do a normal job in the Heavy Hauling Department constitute harassment in retaliation for participation in the *Riffel* suit in 1997.

Even if the complained-of events did rise to the level of actionable harassment under "an *Oncale* analysis," Petitioner can still make no *prima facie* showing that any of Singleton's actions were taken in response to Petitioner's participation in the *Riffel* suit. There is simply no evidence in the record that Singleton was aware of Petitioner's conversation with OG&E's counsel in the *Riffel* suit or was aware of Petitioner's deposition testimony. Without such evidence, Petitioner cannot show the required third element of a retaliation claim – the causal connection between his activities protected under the ADEA and the complained-of actions allegedly taken by his supervisor.

CONCLUSION

For the foregoing reasons, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

DAVID R. TINKLE, Plaintiff,	)	
vs.	)	Case No. CIV-99-1132-P
OKLAHOMA GAS AND ELECTRIC COMPANY, Defendant.	)	

DEFENDANT'S REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Oklahoma Gas and Electric Company ("OG&E") filed its Motion for Summary Judgment and Brief in Support on April 20, 2000. Plaintiff filed a Response on May 31, 2000. In Plaintiff's Response Brief, Plaintiff raises several issues not previously raised in this matter. Additionally, by way of Affidavit, attached as Exhibit "1" to Plaintiff's Response Brief, Plaintiff's [sic] attempts to create a question of fact by directly contradicting his deposition testimony in several important particulars.

I. PLAINTIFF CANNOT CREATE A QUESTION OF FACT BY OFFERING AFFIDAVIT TESTIMONY THAT DIRECTLY CONTRADICTS HIS DEPOSITION TESTIMONY.

There are several points in Plaintiff's Affidavit that directly contradict his sworn deposition testimony. This

attempt by Plaintiff to create a question of fact by contradicting his own testimony must fail.

At page 2 of the Tinkle Affidavit, he states: "I had my deposition taken by Roberta Browning Fields." Mr. Tinkle is referring to the testimony he gave in the *Riffel vs. Oklahoma Gas and Electric Company* case. The deposition of David Tinkle taken on behalf of the plaintiff on June 6, 1997 in the *Riffel vs. Oklahoma Gas and Electric Company* case, *No. CIV-96-1179-A* is attached hereto in its entirety as Exhibit "A." The deposition was taken on behalf of the plaintiff. Mr. Lewis Barber, Jr. asked Mr. Tinkle all of the questions on behalf of his client, plaintiff Don Riffel, and Ms. Fields, attorney for Oklahoma Gas and Electric Company, did not ask one single question of Mr. Tinkle. Mr. Tinkle refers to this previous case and asserts that he was treated differently by his supervisor, John Singleton, after he gave testimony in that case in June of 1997. However, at his deposition in this matter, Plaintiff admitted that his supervisor, John Singleton, had been "out to get him" since 1985. He further admitted that after he testified in the *Riffel* case, Plaintiff's supervisor, John Singleton, treated him differently in the following manner: "A lot of times when he would tell me to do something, his voice would be raised, and he would be irritable. He was more demanding." *Deposition of Plaintiff, attached hereto as Exhibit "B," p. 156.* Plaintiff's assertion that he received adverse employment action as a result of his testimony in the previous case is not supported by Plaintiff's own sworn testimony.

In his Affidavit, Plaintiff asserts that John Singleton tried to intentionally injure Plaintiff as a result of the *Riffel* testimony. As explained more fully in Proposition II

of this Brief, the Company, OG&E could not be held liable for this alleged intentional tort of its employee, John Singleton. Intentionally injuring an employee is not part of a supervisor job. If Plaintiff was injured on the job as a result of the negligence of his supervisor, his exclusive remedy would be through the Workers' Compensation Act. *See Proposition III.* Plaintiff never filed a workers' compensation claim. Plaintiff was injured on August 21, 1997. When Plaintiff filed this suit on August 4, 1999, he still had time to file a workers' compensation claim, but never did.

There is no evidence to support Plaintiff's argument that Mr. Singleton tried to injure him. The uncontroverted evidence is that at the time Mr. Tinkle was re-injured while driving the crane on August 21, 1997 (*Exhibit "B," p. 20*) Defendant had successfully defended the *Riffel vs. OG&E* case. *See Order on Defendant's Motion for Summary Judgment signed July 31, 1997 by Wayne E. Alley, United States District Judge, attached as Exhibit "H" to Defendant's Motion for Summary Judgment and Brief in Support.* There was no reason at that time to believe Plaintiff Riffel had a case against OG&E. Most importantly, Plaintiff's own admission that driving the crane was part of his job, along with the testimony of his co-workers that they also had driven this crane, establishes that this assignment was part of his job and therefore not retaliatory adverse employment action. *See Proposition IV.*

At page 4 of his Affidavit, Mr. Tinkle states: "I was further told by my supervisor that he would not allow me to file a workers' compensation claim and that the company was not going to pay any workers' compensation to me." *Tinkle Affidavit, p. 4.* This statement was contradicted

several times in Plaintiff's sworn testimony. Plaintiff Tinkle specifically testified that he was never told by anyone that he could not file a workers' compensation claim. *Tinkle Deposition attached hereto as Exhibit "B," Vol. I, p. 18.* Plaintiff conceded that he made the decision not to file a workers' compensation claim but to file an insurance claim instead. *Exhibit "B," p. 16,* (he was not sure it was the Company's fault, so he decided to file medical insurance claims); *p. 27* (he never asked anybody about filing a workers' compensation claim); *p. 59* (none of Plaintiff's doctors ever concluded that he should have filed a workers' compensation claim). In any event, when this suit was filed on August 4, 1999, there was still time to file a workers' compensation claim for the injury of August 21, 1997. Plaintiff obviously consulted with an attorney to file this suit, but no workers' compensation claim was ever filed. Based on Plaintiff's testimony that he decided to accept medical insurance benefits and the fact that no workers' compensation claim was ever filed, the only reasonable conclusion is that Plaintiff did not intend to file such a claim. Plaintiff certainly cannot argue that he was prevented from filing by OG&E. For several months prior to the expiration of the two year statute of limitations, he was no longer an employee.

At page 5 of his Affidavit, Plaintiff states: "Since my doctor stated that I only had to be on light duty for two weeks, there was absolutely no justification to place me on short term disability and then long term disability." Plaintiff testified at his deposition that his condition never improved, if anything, he was worse, and he admitted he had never ben released to return to his former job

at OG&E. Plaintiff ignores or misunderstands the permanent medical restrictions given by his doctor. *See Exhibit "12" to Defendant's Motion for Summary Judgment and Brief in Support, Corrected Copy filed as a Supplement to Defendant's Brief on May 9, 2000, attached hereto as Exhibit "B-12."*[1] On the back of the page, Plaintiff's doctor lists the following medical restrictions:

1. No operating heavy equipment;
2. No repetitive use of hands/wrists/fingers; and
3. No lifting/carrying of greater than 25 pounds.

Exhibit "B-12" and Exhibit "B," pp. 1-15.

Plaintiff admits in his deposition that to date these restrictions have not been lifted. *Exhibit "B," pp. 15, 39-40.* Plaintiff further admitted that he was never released to return to his job in the Heavy Hauling Department. *Exhibit "B," p. 20, Vol. II, p. 40.* A second treating physician (Dr. Tipton) gave the opinion as late as March 2, 1998 that Plaintiff was disabled from his own occupation. *Exhibit "B," Vol. III, pp. 122-124 and "Attending Physician Statement," attached as Exhibit 32.* In May of 1999, when Plaintiff made a request for reinstatement, he admits he

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[1] Plaintiff contends this form has been forged or altered. This form attached as Exhibit "B-12," is the medical documentation submitted by Plaintiff and his attorney when Plaintiff wanted to return to work. *See Letter of Lewis Barber, jr.* [sic], *attached as part of Exhibit "B-12."* Defendant did not alter this form. Plaintiff's own testimony and the opinion of two other doctors (Tipton and Jones) confirm that Plaintiff was medically unable to return to his job at OG&E.

had never been released to full duty by his doctor. *Exhibit "B," Vol. II, pp. 5-6.* Tinkle even admitted to his doctor that he did not believe he could go back to work. *Exhibit "B," Vol. I, pp. 43-44.* Tinkle admits that not only has he never been released from these medical restrictions, that, if anything, his condition has changed for the worse. *Exhibit "B," Vol. II, p. 15.* What Plaintiff wanted and still wants is for OG&E to create a job for him that does not currently exist. *Exhibit "B," Vol. III, pp. 101, 102, 109, 110.* This the Company does not have an obligation to do.

At page 6 of his Affidavit, Plaintiff accuses the Company of providing "false information to the disability carrier." Plaintiff filled out his own request for disability benefits and accepted those benefits. *Exhibit "B," pp. 35-36 and Exhibits 1, 17, 18, 19, 20 and 21.* Interestingly, Plaintiff cites no example of false information provided to the carrier. Two of Plaintiff's treating doctors determined that he had permanent restrictions and was unable to return to his job in the Heavy Hauling Department at OG&E. Plaintiff's inability to return to his job was confirmed by the doctor who examined him on behalf of American Fidelity. *See the results of the independent medical examination conducted by Dr. Wilson D. Jones, IV, Exhibit "D" to Defendant's Motion for Summary Judgment and Brief in Support, Affidavit of Janie McKinney and Exhibit "D-4," ("McKinney Affidavit").*

Plaintiff repeatedly refers in his Affidavit to the fact that he was disqualified from disability benefits because of the part time job he had at the car wash. The Affidavit of Janie McKinney, attached as Exhibit "D" to Defendant's Motion for Summary Judgment and Brief in Support, makes its [sic] clear that Plaintiff's benefits were

terminated because he no longer met the definition of "disabled." Plaintiff's own doctors agreed that he was qualified to work at *a* job, just not *his* job in the Heavy Hauling Department of OG&E. Accordingly, since Plaintiff was able to work at a job, he was not considered disabled under the American Fidelity Benefit Plan offered to OG&E employees and purchased by Plaintiff. The job at the car wash confirmed that he was in fact able to work at a job.

At page 7 of Plaintiff's Affidavit, he states:

> My attorney informed me of the fraudulent documents used by OG&E and American Fidelity in processing my claims for disability and, the reasons I was not allowed to file a workers' compensation claim. These revelations led me to the conclusion that trying to pursue the appeal of the action by American Fidelity would be futile.

Plaintiff makes this unsupported assertion in an effort to avoid Defendant's argument that Plaintiff's ERISA claim must be dismissed for Plaintiff's failure to exhaust administrative remedies. Plaintiff does not identify the "fraudulent documents" and does not give any information about what his attorney told him that caused him to fail to pursue an appeal of American Fidelity's action.

These statements are also inconsistent with the actions taken by Plaintiff and his attorney. At Exhibit "D-6" to Defendant's Motion for Summary Judgment and Brief in Support, a letter is attached from Janie McKinney, American Fidelity, to Lewis Barber, Jr., attorney for David Tinkle, acknowledging receipt of the letter dated June 5, 1999 on behalf of Mr. Tinkle and asking for "any information that will allow us to understand fully the reasons

you feel our decision to terminate benefits beyond 24 months should be reevaluated." The letter from Janie McKinney, AGD Manager, Benefits Department, American Fidelity, goes on to say once information is received, the Appeal Committee would reevaluate the decision and if appropriate schedule an appear [sic] hearing for Mr. Tinkle. After initially inquiring about an appeal, neither Mr. Tinkle nor his attorney supplied any additional information to Janie McKinney. *See McKinney Affidavit.* Plaintiff David Tinkle's statement in his Affidavit that he determined not to bother with an appeal based [sic] what his attorney told him is inconsistent with their effort to begin an appeal. Like many of the bold, self-serving and unsupported statements in Plaintiff's Affidavit, it is simply not to be believed. Plaintiff has failed to exhaust his administrative remedies.

Self-serving affidavits cannot supersede contradictory sworn testimony given earlier in a deposition. *Darnell vs. Target Stores,* 16 F.3d 174 (7th Cir. 1993). A party cannot create a question of fact by using an affidavit to contradict previously sworn deposition testimony. *Cleveland vs. Policy Management Systems,* 526 U.S. 795, 119 S.Ct. 1597 (1999); *Colantuoni vs. Alfred Calcagni & Sons, Inc.,* 44 F.3d 1, 5 (1st Cir. 1994) (affidavit submitted after motion for summary judgment was filed would not be considered where affidavit directly conflicted with plaintiff's deposition testimony and did not explain the reason for the conflict); *Hackman vs. Valley Fair,* 932 F.2d 239, 241 (3rd Cir. 1991) (affidavit claiming plaintiff had been confused during prior deposition did not create material fact issue precluding summary judgment); *Barwick vs. Celotex Corp.,* 736 F.2d 946, 960 (4th Cir. 1984) (genuine issue of

material fact is not created where only issue of fact is to determine which of two conflicting versions of plaintiff's testimony is correct); *Albertson vs. T. J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984) (non-movant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony); *Davidson & Jones Development Co. vs. Elmore Development Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991) (after a motion for summary judgment has been filed, thereby testing the resisting party's evidence, a factual issue may not be created by filing an affidavit contradicting earlier deposition testimony); *Slowiak vs. Land O' Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir. 1993) (self-serving affidavits without factual support in the record will not defeat a motion for summary judgment); *Camfield Tires, Inc. vs. Michelin Tire Corp.*, 719 F.2d 1361, 1365-66 (8th Cir. 1983) (affidavit directly contrary to deposition testimony did not create a genuine issue as to a material fact so as to preclude summary judgment where the affidavit did not explain the deposition testimony and the earlier deposition testimony did not reflect any confusion that might require explanation); *Kennedy vs. Allied Mutual Insurance Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony if the affidavit is a sham produced merely to avoid summary judgment); *Franks vs. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986) (court may disregard affidavit conflicting with affiant's prior sworn statements if it concludes that it is merely an attempt to create sham fact issue); *Pyramid Securities Ltd. vs. IB Resolution, Inc.*, 924 F.2d 114, 1123 (C.A.D.C.), *cert. denied*, 502 U.S. 822, 112 S.Ct. 85, 116

L.Ed.2d 57 (1991) (affiant could not defend summary judgment where it did not contain new evidence, and did not show confusion of lack of access to the facts in prior sworn testimony); and *Sinskey vs. Pharmacia Opthalmics, Inc.*, 982 F.2d 494, 498 (C.A.Fed. 1992), cert. denied.

This effort by Plaintiff to thwart the summary judgment process must fail.

II. PLAINTIFF DOES NOT HAVE A CLAIM OF INTENTIONAL INJURY AGAINST OG&E.

In Plaintiff's Response Brief and in the Affidavit of David Tinkle attached as Exhibit "1" to Plaintiff's Response Brief, Plaintiff argues that his supervisor, John Singleton, intentionally injured him. "Singleton calculated, schemed, and planned to harm and place me in a dangerous position." *Affidavit of David Tinkle, p. 7, attached as Exhibit "1" to Plaintiff's Response Brief ("Tinkle Affidavit").* "At the time, Singleton ordered me to drive the 75 Ton Road Crane from Ardmore, he was fully aware of my back and neck ailments; that my body size (6' 2") was too large for the cabin of the Road Crane and, with my 'hard-hat' on, my head was touching the roof of the cabin." *Tinkle Affidavit, p. 8.* "In the course of driving the Road Crane from Ardmore, my head was constantly hitting the roof of the cabin, and on one instance my head hit the roof with such force that I sustained further injury to my neck." *Tinkle Affidavit, p. 4.*

In Plaintiff's Complaint, attached hereto as Exhibit "C," Plaintiff attempts to state a claim for intentional or negligent infliction of mental and/or emotional distress, but makes no allegation of intentional injury. With the

contentions in Plaintiff's Response Brief and Affidavit, it appears that he is attempting to assert that his supervisor, John Singleton, "calculated, schemed, and planned" to intentionally injure him. If Plaintiff had such a claim, it would not be against his former employer, OG&E, but against John Singleton. Plaintiff cannot state a claim for intentional injury against OG&E. The general rule is that an agent's tortious or criminal assault on a third party cannot be considered within the scope of the agent's authority, unless the assault could have been "anticipated by the employer" as a foreseeable means of accomplishing the job for which the agent was employed. *Clark vs. Brien*, 59 F.3d 1082, 1987 (10th Cir. 1995), citing *Allison vs. Gilmore, Gardner & Kirk, Inc.*, 350 P.2d 287, 290-92 (Okla. 1960). In *Allison* the Court held the employer not liable when an employee got into a fight with a third party who challenged the way the employee was doing his job. *See also Tulsa General Drivers Union vs. Conley*, 288 P.2d 750, 753 (Okla. 1985) ("it is not, as a general rule, within the scope of the servant's employment to commit an assault upon a third person and the master is not liable for such an assault, though committed while the servant was about his master's business"). Here, even assuming for the purpose of this Motion that Plaintiff's supervisor, John Singleton, intended to injure him, there is no evidence that such an assault was "anticipated by the employer" as a foreseeable means of accomplishing his job as supervisor. Such a claim against OG&E must be dismissed.

III. A CLAIM FOR NEGLIGENT INJURY WOULD BE BARRED BY THE WORKERS' COMPENSATION ACT.

If Plaintiff was injured as a result of his supervisor's negligence in assigning him to drive the crane, then OG&E's liability could only be under the Workers' Compensation statutes. For an employee injured on the job as a result of a supervisor's negligence, the Workers' Compensation statutes provide the exclusive remedy. *Title 85, § 12 of the Oklahoma Statutes.* Section 12 provides as follows:

> The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees . . . , at common law or otherwise, for such injury, loss of services, or death, to the employee . . . .

Section 11 of Title 85 provides:

> Every employer subject to the provisions of the Workers' Compensation Act shall pay, or provide as required by the Workers' Compensation Act, compensation according to the schedules of the Workers' Compensation Act for the disability or death of his employee resulting from an accidental or personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury,. . . .

Plaintiff never filed a workers' compensation claim. He testified that he made a decision not to file a workers' compensation claim. Plaintiff contends he was injured August 21, 1997. This suit was filed August 4, 1999. At

that time, Plaintiff was still within the two year statute of limitations and could have filed a workers' compensation claim in addition to or in lieu of this action. *85 O.S. § 43.* Given Plaintiff's previous testimony that he decided not to file a workers' compensation claim and the fact that he consulted a lawyer well before the two year statute of limitations ran out, the only logical conclusion is that Plaintiff made a decision not to file a workers' compensation claim. If [sic] any event, any liability for negligently injuring Plaintiff would be under the Workers' Compensation statutes.

IV. THE EVIDENCE DOES NOT SUPPORT PLAINTIFF'S CLAIM HE WAS ASSIGNED TO DRIVE THE CRANE IN RETALIATION FOR HIS TESTIMONY.

Plaintiff argues finally that he was given the job assignment to drive the 75-ton crane as a result of his testimony in the *Riffel* case. This argument must similarly fail. Plaintiff admits that he had previously driven the 75-ton crane. *Exhibit "B," Vol. II, pp. 65-66.* So have other employees. There is a difference between operating and driving the crane. There are two separate cabs on this large crane. One is used when someone is operating the crane and the other is used when someone is driving the crane. Don Riffel testified that he has previously driven (not operated) the 75-ton crane. *Deposition of Don Riffel taken June 27, 2000, to be supplied when transcribed as Exhibit "D."* Charles Wilson, a retired employee, gave an Affidavit that is attached as Exhibit "3" to Plaintiff's Response to Defendant's Motion for Summary Judgment and Brief in Support. In his Affidavit, Mr. Wilson states

he has previously driven the 75-ton crane. Glen Chartney and Ray Rigsby have testified that they have previously driven the 75-ton crane. *Deposition of Glen Chartney, to be transcribed and supplied as Exhibit "E"; Deposition of Ray Rigsby to be transcribed and supplied as Exhibit "F."* Even Tinkle admits that he had been previously assigned to drive the 75-ton crane. *Exhibit "B," Vol. I, p. 38.* Although not a favorite job assignment of any of the employees, driving the 75-ton crane was something most, if not all the employees in the Heavy Hauling Department had previously done.[2] It was part of David Tinkle's job to drive the crane. *Exhibit "B," Vol. I, pp. 33-36, 42.* Before the crane incident, Plaintiff's doctor had released him to drive and operate heavy equipment. *Exhibit "B," Vol. I, pp. 43-44 and Vol. II, p. 80.* He was released to full duty at the time he was asked to drive the crane back from Ardmore. Given the fact that it was part of Plaintiff's job duties to drive this 75-ton crane, he cannot now complain that this job assignment was given solely as a result of his testimony in the *Riffel* case.

At page 4 of Plaintiff's Brief, Plaintiff contends "in fear of aggravating or re-injuring his neck and back, Tinkle begged of Singleton to reconsider his order, and Singleton refused." Plaintiff offers his Affidavit, attached as Exhibit 1, as support for this statement. Again, Plaintiff's deposition testimony contradicts his Affidavit.

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[2] Tinkle testified there were nine to ten people in the Heavy Hauling Department. *Exhibit "B," Vol. I, p. 35.* Wilson, Rigsby, Tinkle and Riffel have admitted driving the crane. Rigsby testified that Narry, Brakehill and Sitton have driven the crane. *Exhibit "F," pp. ___.*

Plaintiff testified he told his supervisor, John Singleton, he did not need to be in the crane because he knew how to drive. John Singleton responded that everybody needed to be able to drive the crane and do all the work that was required. Plaintiff did not tell his supervisor that he felt he did not need to be in it because of his medical condition. Plaintiff never said to his supervisor, "I'm afraid I'm going to get hurt if I drive the crane." *Exhibit "B," Vol. II, pp. 52-53.*

OG&E denies that its employee John Singleton set in motion a plan to intentionally or negligently injury [sic] Plaintiff. However, even if Mr. Singleton's negligence resulted in an on-the-job injury to Plaintiff, his exclusive remedy would be in the Workers' Compensation Court. If Mr. Singleton's intentional acts caused the injury to Plaintiff, such action by Mr. Singleton would be outside of his employment and Plaintiff's action would be against Mr. Singleton, not OG&E. The same would hold for an intentional attempt by Mr. Singleton to injury [sic] Plaintiff. Under no circumstance would Plaintiff have a cause of action against OG&E based on an allegation that Mr. Singleton negligently or intentionally injured Plaintiff. The evidence also does not support Plaintiff's claim that he was assigned to drive the crane in retaliation for his testimony.

CONCLUSION

Plaintiff's sham affidavit does not created [sic] a genuine issue of material fact that would defeat Defendant's Motion for Summary Judgment. Defendant's Motion should be granted.

Respectfully submitted,

Roberta Browning Fields, OBA #10805
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ATTORNEYS FOR DEFENDANT,
OKLAHOMA GAS AND
ELECTRIC COMPANY

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of June, 2000, a true and correct copy of the above and foregoing instrument was mailed, U.S. Mail, with first class postage prepaid thereon, to:

Lewis Barber, Jr., Esq.
1528 Northeast 23rd Street, Suite 410
Oklahoma City, Oklahoma 73111

ATTORNEY FOR PLAINTIFF,
DAVID R. TINKLE

Roberta Browning Fields

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DAVID A. TINKLE, Plaintiff, vs. OKLAHOMA GAS AND ELECTRIC COMPANY, DEPARTMENT OF DEFENSE, Defendant.	)	No. CIV-99-1132-P

The Deposition of DAVID A. TINKLE
Taken on behalf of the Defendants
On February 21, 2000
In Oklahoma City, Oklahoma

REPORTED BY:
Ms. Susan Narvaez
Certified Shorthand Reporter

PLUMBTREE, BEELER & SCHMITZ
COURT REPORTING SERVICES
1950 Bank One Tower, 100 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-1600

* * *

[16] A. I had a compressed disc which was pressing the nerve, and they went in and scraped the disc to relieve the pressure.

Q. Who did that surgery?

A. I believe it was Dr. Stough.

Q. S-t-o-w?

A. S-t-o-u-g-h, I think.

Q. Okay. What were you told was the cause of the '85 back surgery?

A. He didn't say.

Q. Did you ask anybody?

A. No. The problem came up gradually over a period of time until the pain got so painful I just had to go to the doctor.

Q. Was there any kind of accident or injury that caused that back problem?

A. I felt the problem was part of it on my job, working it daily, the lifting and other odds and ends that I did throughout the day. And I took, instead of saying it was the company's fault, that I wasn't sure. I just went on sick leave and went through the insurance.

Q. So instead of filing a workers' compensation claim, you used up sick leave and used the company medical insurance?

A. Right.

* * *

[18] your back?

A. No.

Q. What about the neck surgery in '97? What was that surgery for?

A. A ruptured disc in my neck.

Q. What caused that ruptured disc in your neck, if you know?

A. Dr. Schimandle told me it was due to driving the semis and the bouncing and jarring that occurs from doing my job.

Q. Did you ever file a workers' compensation claim for that neck surgery?

A. No.

Q. Did you do the same thing, take sick leave and use the medical insurance that you had?

A. Yes.

Q. Why didn't you ever file a comp claim for the '97 neck surgery?

A. I didn't want to make waves.

Q. Did anybody ever tell you not to file a comp claim?

A. No.

Q. When was the neck surgery in '97? What month, do you remember?

A. I'm not sure of the date. I have it – it's

* * *

[27] Is that the Dr. S?

A. Schimandle.

Q. Schimandle? Did you talk to your doctor about filing a workers' compensation claim?

A. No.

Q. Why not?

A. I didn't want to cause waves.

Q. Did you even ask anybody about filing a workers' compensation claim?

A. No.

Q. Did you think that you had fully recovered from that March '97 neck surgery when you went back to work?

A. No.

Q. Did you, when your doctor released you to go back to work after that March '97 injury, did you disagree with his decision to release you to go back to work?

A. No.

Q. Was there a period after that March of '97 surgery where you were on light duty?

A. Yes.

Q. How long were you on light duty?

A. Two days.

Q. What did you do on light duty?

A. I answered the phone and radio and filed

* * *

[42] A. Schimandle.

Q. What did he say?

A. He said – I told him what happened and he said, "What is wrong with that man?" Referring to John Singleton. "He shouldn't have put you in that crane."

Q. Is this a conversation that you taped?

A. No.

Q. When you were instructed to drive the crane that day, did you refuse or tell John that you didn't think it would be good for you?

A. I told John that I didn't think I should be in it; that I knew how to run it. And he said, "You need the experience and you're going to drive it." And I said, "I know how to drive it." He said, "You're being paid top pay to do everything. You will drive it back from Ardmore."

Q. Driving a crane was part of your job at that time, right?

A. That's part of everybody's job, to know how, with exceptions.

Q. Well, but it was part of your job to do it?

A. Yes.

Q. If the doctor didn't want you driving a crane, do you know why he didn't put that as a restriction for your job?

[43] A. After the incident he did.

Q. Well, but if he didn't want you driving a crane, why didn't he put that as a restriction before the incident?

A. I have no idea what the doctor thinks or says before.

Q. I understand, but as part of the doctor releasing you to go back to work, did you discuss with your doctor what some of your job duties were?

A. At that time, no. He knew what my job requirements were from the past.

Q. Is that information that you had given the doctor?

A. Yes.

Q. What information did you give this doctor about your job duties?

A. I told him that my main job was driving a semi, hauling heavy equipment. At times I had to operate the cranes, the dozers, besides just loading and unloading.

Q. And what was your doctor's response?

A. He said that I could not continue very much longer hauling and driving the semis and operating heavy equipment.

Q. Did he release you then to drive that equipment?

[44] A. Yes.

Q. So why did he do that? Was he telling you it was okay for now but you might not be able to do it forever? What was he saying?

A. Basically, yes.

Q. On the one tape that I listened to the doctor is asking you if you feel like you can go back to work, and

you say, "No, I don't believe I can." And he said, "Then, fine, I'm not going to release you to go back to work." Do you remember that conversation with your doctor? This is after the reinjury.

A. Yes.

Q. Was it your doctor's practice to ask you how you felt, if you were ready to go back, if you could go back?

A. I don't know what is customary for what doctors' opinions are.

Q. I know, but how did he treat you? From the one tape I heard it sounded like he was the kind of doctor that was relying, at least in part, on how you were reporting that you felt, is that correct?

A. He did ask me what I thought, and I was basing my judgment on what he had told me previously. Do you think – well, I'm mixed up now.

Q. We're talking about two different time

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DAVID A. TINKLE, Plaintiff, vs. OKLAHOMA GAS AND ELECTRIC COMPANY, DEPARTMENT OF DEFENSE, Defendant.	)	No. CIV-99-1132-P

Continuation of the Deposition of
DAVID A. TINKLE
Taken on behalf of the Defendants
On March 1, 2000
In Oklahoma City, Oklahoma

REPORTED BY:
Ms. Susan Narvaez
Certified Shorthand Reporter

PLUBTREE, BEELER & SCHMITZ
COURT REPORTING SERVICE
1950 Bank One Tower, 100 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-1600

* * *

[5] about August 1, 1997. Do you see that? There it is, august [sic] 1, 1997. Is that a correct statement? Is that when you went on disability leave?

A. Yes.

Q. And the rest of the sentence said, Denied Plaintiff's request for reinstatement on or about May 24, 1999. Do you see that?

A. Yes.

Q. Who did you make that request for reinstatement to?

A. OG&E.

Q. What name? What person? Who did you contact at OG&E?

A. I'm not sure who it was.

Q. Was it by letter or by phone call?

A. It was by letter.

Q. Did you write to a man or a woman, or do you remember?

A. I don't remember.

Q. What was your understanding about why you couldn't come back to work?

A. Because there was no light duty that I could perform.

Q. At that time, in May of 1999, had you been released to full duty by your doctor?

[6] A. No.

Q. Let me hand you what's been marked as Exhibit 9.

(Defendant's Exhibit No. 9 marked.)

Q. And I'll ask you if you received a copy or if you remember receiving a copy of this memo?

A. I remember a letter, but the letter I received, that I remember on this here, was from American Fidelity requesting Social Security denial or approval.

Q. This form, it sounds to me, is from a person at OG&E telling you that you've been gone long enough that you are eligible for long-term disability benefits, but you have to apply. Is that what you understood?

A. This here says applying for Social Security. I don't remember –

Q. That's the second paragraph. In the first paragraph –

A. Oh, in the first paragraph? I can't say for sure or not that I got anything from this first paragraph.

Q. Okay. Now, we already looked at Exhibit 1. Is that a form that you filled out?

A. Yes.

Q. Is that your signature at the bottom?

A. Yes.

Q. And was that a form that you filled out –

* * *

[12] off and on, mostly to get what reports I could get from him.

Q. Is he still practicing medicine?

A. As far as I know he's not practicing at this time. He's supposed to send me a letter documenting all my medical results, tests, all my MRI's, all my past history, and he's so far refused to send one after he's been paid.

Q. Do you know why he's not practicing?

A. Something to do about the medical board.

Q. Okay. Someone told me he had been disciplined or something had happened, but I didn't know the story, and I wondered if you did.

Let me hand you what's been marked as Exhibit 12.

(Defendant's Exhibit No. 12 marked.)

Q. I'm going to mark – there's no writing where I'm marking, is there?

A. No.

Q. Because this page – and it's a front and back form, too. Now, this is called a Medical Status Report, right?

A. Yes.

Q. And you've signed up at the top giving the doctor permission to send out this report, right?

A. Yes.

[13] Q. Now, this was Dr. –

A. Schimandle.

Q. Okay. And the date you signed it is April 5 of '99, correct?

A. Correct.

Q. And that looks like the same date the doctor signed it, doesn't it?

A. No.

Q. Well, there's the doctor's signature and there's the date.

A. Oh.

Q. And that's the date that you signed it.

A. Oh, I was looking up here. I was misreading.

Q. It's easy to do on these forms.

And this is the form where he says you can come back but you've got restrictions, right?

A. Come back with restrictions, yes.

Q. And on the back of Page 1 is where the doctor has listed your restrictions, correct?

A. Yes.

Q. And he said that, what, you can't lift or carry more than 25 pounds?

A. Yes.

Q. And you can't have repetitive use of your hands, wrists or fingers?

[14] A. Yes.

Q. And you can't operate heavy equipment?

A. Yes.

Q. Are there any other restrictions that you see on the form or that you remember he told you about?

A. There's other restrictions. No driving the semis. There's others that I've seen in there that are not on here.

Q. And it may be that when – I don't know what he was thinking, but when he said "no operating heavy equipment," he may have been referring to no semis, no cranes. I don't know what he meant.

A. Could very well have been.

Q. But you do remember him discussing with you that you shouldn't drive the semi trucks?

A. Yes.

Q. Now, the second page of this Exhibit 12 is a letter to Belleva Johnson at OG&E, and it's from your lawyer, Lewis Barber. And is that your signature on the second page of Exhibit 12?

A. Yes.

Q. Did you see this letter before it went out to OG&E?

A. Yes.

Q. When you sent this letter with this Medical [15] Status Report that's Exhibit 12 to OG&E, was this the most current Medical Status Report that you had?

A. I don't know.

Q. Well, I guess what I'm trying – did you have any more current or recent or different medical information that you sent to OG&E? Maybe a better way to ask it is,

don't focus on the dates, but did you ever have a Medical Status Report that you gave to OG&E that released you from these restrictions?

A. No.

Q. So whether the date is correct or not, this form contains the most current medical report about you, right?

A. I don't know.

Q. Well, has anything changed? Can you lift 50 pounds? Can you operate the heavy equipment?

A. No.

Q. So has anything changed? Has your condition changed from this Medical Status Report, in your opinion?

A. My condition has changed somewhat.

Q. For better or for worse?

A. Worse.

Q. Let me hand you what's been marked – you know anytime you need a break, you just need to ask, right?

A. Yes.

* * *

[65] Q. Now, you told me before that you had operated the crane pretty regularly as part of your job, right?

A. Not the 75-ton crane.

Q. You operated cranes routinely as part of your job, right?

A. Yes.

Q. And you had driven one out on the highway once before coming from, what, Shawnee back to Oklahoma City?

A. Yes. No, it was to Shawnee from Oklahoma City.

Q. Okay. You drove one to Shawnee?

A. A 75-ton crane.

Q. The same one?

A. Yes.

Q. When was it that you drove the 75-ton crane from Oklahoma City to Shawnee?

A. I'm not sure of the date.

Q. Was it before or after your neck surgery?

A. Before.

Q. Did you have a problem that day driving that crane?

A. Yes.

Q. What was the problem that you had?

A. Keeping it on the road, bouncing hard, [66] jarring, some minor shifting.

Q. I guess what I'm wondering is, do you feel like you got injured when you drove it from Oklahoma City to Shawnee?

A. No.

Q. Why were you able to drive it that first time without getting injured?

A. Part of it, the road was a little smoother; it wasn't as far; drove it slower.

Q. Did John give you that assignment, driving the 75-ton crane from Oklahoma City to Shawnee?

A. Yes.

Q. Did you report to him when you got back from that job about the job?

A. I don't follow.

Q. Well, when you drove it from Oklahoma City to Shawnee, when you got back to work that day, did you tell him, John, I had a hard time, I couldn't do it, don't ever give me that job again, or I was able to do it? Did you give him any information about that job?

A. No.

Q. Okay. Ray Pierce, you can't think of anything specific about him except he would have been around when different things were said and happened?

A. Yes.

* * *

[80] Q. So he was your supervisor on the day you were injured?

A. Yes.

Q. Of that project?

A. Yes. He made a statement to me, along with Rick Brakebill, that John was showing his authority, that John knew I shouldn't have been in the crane; he knows my medical condition. And if I wanted to, Rick could drive the crane most of the way back. And I told them both, I says, I appreciate the offer, but if John found out that I didn't drive the crane all the way back, I would be in trouble.

Q. So you declined?

A. I declined their help because I didn't want them to get in trouble and I didn't want to get into more trouble. And if John found out, they would be in trouble.

Q. Now, at the time, we talked about this before, at the time John asked you to drive the crane back, did you have any medical restrictions in place that said you shouldn't operate or drive the crane?

A. No.

Q. Is there anything else you can think of that Craig might be able to testify to?

A. Nothing that hasn't already been said.

Q. I know a lot of these people are involved in

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DAVID A. TINKLE, Plaintiff, vs. OKLAHOMA GAS AND ELECTRIC COMPANY, DEPARTMENT OF DEFENSE, Defendants.	)	No. CIV-99-1132-P

VOLUME III

DEPOSITION OF DAVID TINKLE
TAKEN ON BEHALF OF THE DEFENDANTS
ON MARCH 6, 2000
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

For the Plaintiff:

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For the Defendant:

MS. ROBERTA BROWNING FIELDS
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Oklahoma City, Oklahoma 73102

REPORTED BY: BRENDA SCHMITZ, CSR, RPR

* * *

[101] that you could do with your restrictions?

A. There's a lot of jobs I could do in the company with my restrictions.

Q. For example?

A. They have security guard positions, they have safety officers that drive pickups or cars.

Q. Did you ever apply for a security guard position?

A. No.

Q. Do you know if there were any of those positions open at the time you were wanting to come back?

A. No, I do not know if there's any open.

Q. Did you apply for any other jobs at OG&E, other than your request to be reinstated to the job that you had?

A. No.

Q. Why not?

A. I was letting my attorney handle all of my affairs, according to what's going on.

Q. Did you ever talk to anybody at OG&E about coming back to a different job, not your old job, but coming back to a different job?

A. No. Yes. I take that back.

Q. Who was it?

[102] A. John Singleton.

Q. And when was it?

A. I'm not sure. It was after I was put on disability, John Singleton called me up and said they were looking for a position that I could do. And he never returned the call.

Q. Did you call him back?

A. No. He said he would be in touch.

Q. John Singleton called you?

A. Yes.

Q. And said he was looking for a position that you could do?

A. Yes.

Q. With your restrictions?

A. Yes.

Q. Was it after you went on long-term disability?

A. I'm not sure if it was on a short-term or a long-term.

Q. And you never called him back and he never called you back?

A. Nope.

Q. Why didn't you call him back?

A. I believed if he had something, he would contact me.